January 15, 2020

BY ELECTRONIC FILING
The Honorable James E. Boasberg
Presiding Judge
United States Foreign Intelligence Surveillance Court
Washington, DC

Re: *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*
Docket No. Misc. 19-02

Judge Boasberg:

Undersigned *amicus curiae* submits this letter brief, as directed by the Court's order of January 10, 2020, in response to the government's submission of the same day in the above-captioned matter.

Introduction and Procedural History

On December 17, 2019, this Court ordered the government by January 10 to "inform the Court in a sworn written submission of what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue presented by the application." Order at 3-4. The Court's order responded to reports, including from the Inspector General of the Department of Justice (DOJ), that FBI personnel had "provided false information ... and withheld material information ... in connection with four applications to the Foreign Intelligence Surveillance Court (FISC) for authority to conduct electronic surveillance of a U.S. citizen named Carter W. Page." *Id.* at 1; see Office of the Inspector General, U.S. Department of Justice, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 2019) (hereinafter Report or OIG Report). The Court further ordered that "[i]n the event that the FBI at the time of [its] submission is not yet able to perform any of the planned steps described in the submission, it shall also include (a) a proposed timetable for implementing such measures and (b) an explanation of why, in the government's view, the information in FBI applications submitted in the interim should be regarded as reliable." Order at 4.

On January 10, 2020, the government filed its response as directed by the Court. The response, which includes a declaration from FBI Director Wray, describes certain measures that the government has already adopted in its effort to ensure the accuracy of FBI FISA applications, several others that are in the process of being implemented, and a few additional possibilities that remain under consideration. On the same day as the Court received the

government's response, it issued an order appointing the undersigned as *amicus curiae* pursuant to 50 U.S.C. § 1803(i). The appointment order directed the filing of this letter brief to "assist the Court in assessing the government's response" concerning the factual accuracy of FBI FISA applications. Appointment Order at 1.

As directed by the Court, this brief is limited to the question of ensuring factual accuracy in FBI FISA applications. It assesses the 12 "Corrective Actions" announced by Director Wray that pertain to FBI FISA accuracy, but it does not address more than 28 additional Corrective Actions that he announced, or any of the other issues reviewed or raised by the OIG Report. See Report at 425. Thus, for example, the brief does not discuss the definition of a "Sensitive Investigative Matter" (SIM) or the requirements for DOJ approvals of a SIM. It does not address training and best practices for the recruitment and handling of confidential human sources (other than as necessary to ensure FISA accuracy). And it does not consider the appropriate standards for conducting investigations of or defensive briefings for U.S. political campaigns. Rather, as ordered by the FISA Court, the sole question presented in this brief concerns the "critically important" but limited question of whether the 12 Corrective Actions and related measures proposed by the government are sufficient to provide assurance to the Court that "FBI applications accurately and fully reflect information known to the Bureau that is material to those applications." Appointment Order at 1. As detailed below, this brief argues that the FBI's proposed Corrective Actions are insufficient and must be expanded and improved in order to provide the required assurance to the Court.

The brief is based principally on a review of the OIG Report and related materials but is also informed by undersigned *amicus curiae*'s professional experience. This experience includes nearly two decades of study, teaching and writing about FISA and national security, including as co-author of a national security legal treatise first published in 2007; exposure to other examples of FBI failures and associated remediation as documented in and suggested by prior OIG reports; time spent reviewing and approving individual FISA applications, in both Republican and Democratic administrations, during the periods before, during, and after the September 11, 2001 terrorist attacks; two years as the Assistant Attorney General for National Security; efforts to implement reforms to FISA, including as necessary to address publicly-documented accuracy issues at the FBI in 2000, and later at other government agencies; lessons learned from litigation in the FISA Court and the Court of Review; work with the FBI as a trial and appellate prosecutor in criminal cases in Washington, DC and elsewhere; and more than a decade of combined experience in the private sector, as a general counsel, and as the chief ethics and compliance officer of a U.S. public company.

This brief also reflects more than a month of focused consideration of the question of FBI FISA accuracy, beginning when the OIG Report was issued on December 9, 2019, and including in connection with an essay of approximately 10,000 words published on December 23, 2019. See David S. Kris, *Further Thoughts on the Crossfire Hurricane Investigation* (Dec. 23, 2019), available at https://www.lawfareblog.com/further-thoughts-crossfire-hurricane-report (Crossfire Hurricane Essay). The government's rolling timetable for taking Corrective Actions calls for certain potentially significant measures to be undertaken or completed in the very near

term, some of which may serve as a foundation for future corrective activity. The brief is intended to aid the Court in timely evaluating this ongoing and potentially foundational activity, and undersigned *amicus curiae* is prepared to supplement the brief, if and when directed by the Court, as needed to address any newly-available information, materials or other actions taken by the government.

Summary of Argument

The FBI is subject to an obligation of scrupulous accuracy in representations made to this Court. It breached that obligation through a series of significant and serious errors and omissions. Recognizing the need for reform, the government now proposes 12 individual Corrective Actions that fall into three broad categories: (a) FISA standards and procedures; (b) training; and (c) audits and reviews. These Corrective Actions point in the right direction, but they do not go far enough to provide the Court with the necessary assurance of accuracy, and therefore must be expanded and improved. This brief proposes for the Court's consideration several additional corrective actions in each of the three categories. It also proposes measures designed to restore and strengthen the FBI's organizational culture of individual responsibility for rigorous accuracy in this Court.

All of the proposals and recommendations in this brief are consistent with the separation of powers. There are limits on this Court's ability to dictate "the internal organization and investigative procedures of the Department of Justice," *In re Sealed Case*, 310 F.3d 717, 731 (FISCR 2002), but as the Supreme Court has explained, "magistrates remain perfectly free to exact such assurances as they deem necessary ... in making probable cause determinations," *Illinois v. Gates*, 462 U.S. 213, 240 (1983). The Court has asked the government why its FISA applications should be trusted, and the government has answered with a proposal to implement various improvements over time, and a promise of further updates and continued cooperation. See Wray Declaration ¶¶ 14, 20. In that context, any specific separation of powers issue can be resolved if and when the Court determines that it must require a particular corrective action over the government's objection.

Argument

1. The Importance of Accuracy, the FBI's Failures, and the Need for Reform

This Court's order of December 17, 2019 explains the fundamental importance of scrupulous accuracy in FISA applications. As the Court stated (Order at 2, footnotes omitted, alterations in original):

> Notwithstanding that the FISC assesses probable cause based on information provided by the applicant, "Congress intended the pre-surveillance judicial warrant procedure" under FISA, "and particularly the judge's probable cause findings, to provide an external check on executive branch decisions to conduct surveillance" in order "to protect the fourth amendment rights of U.S. persons." The FISC's assessment of probable cause can

> serve those purposes effectively only if the applicant agency fully and accurately provides information in its possession that is material to whether probable cause exists. Accordingly, "the government ... has a heightened duty of candor to the [FISC] in *ex parte* proceedings," that is, ones in which the government does not face an adverse party, such as proceedings on electronic surveillance applications. The FISC "expects the government to comply with its heightened duty of candor in *ex parte* proceedings at all times. Candor is fundamental to this Court's effective operation ...."

The Supreme Court has also emphasized the importance of accuracy and candor in *ex parte* warrant proceedings.[1] As the Court put the matter in *Franks v. Delaware*, "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." 438 U.S. 154, 164-165 (1978) (internal quotation omitted, alteration and emphasis in original). There can be no dispute about the legal, ethical, and practical reasons why the government must adhere to a strict duty of candor and accuracy before the Court.

Nor can there be any dispute that the government has profoundly failed to meet that duty. As the Court is well aware (Order at 2-3), the Inspector General's report found "basic, fundamental, and serious errors during the completion of the FBI's factual accuracy reviews ... which are designed to ensure that FISA applications contain a full and accurate presentation of the facts." Report at 413. It concluded that the FBI "failed to comply with FBI policies, and in so doing fell short of what is rightfully expected from a premier law enforcement agency entrusted with such an intrusive surveillance tool." *Id.* at 414. As this Court stated in its Order (at 3), the "FBI's handling of the Carter Page applications, as portrayed in the OIG report, was antithetical to the heightened duty of candor described above."

The government cannot, and does not, dispute either its duty or its failures. Director Wray's declaration provides (¶ 20, emphasis added): "The FBI has the utmost respect for this Court, and deeply regrets the errors and omissions identified by the OIG. The OIG Report and the affiliated Rule 13(a) letters describe conduct that is unacceptable and unrepresentative of the FBI as an institution. FISA is an indispensable tool in national security investigations, and in recognition of our duty of candor to the Court and our responsibilities to the American people, the FBI is committed to working with the Court and DOJ to ensure the accuracy and completeness of the FISA process." See also OIG Report at 424-25 (letter to the Inspector General from Director Wray). There is no room for disagreement on these foundational points.

2. Separation of Powers

None of the proposals and recommendations set forth below is prohibited by the separation of powers. The government does not resist this Court's authority to demand

[1] Whether or not FISA orders are technically "Warrants" under the Constitution, the need for accuracy and the scope of proper judicial inquiry under FISA are properly informed by Fourth Amendment standards. See, e.g., David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* (3d ed. 2019) §§ 11:2 et seq. (NSIP).

assurances of ongoing accuracy. Nor could it. Judges retain substantial discretion when reviewing the sufficiency and credibility of an affidavit submitted in support of a warrant. As the Supreme Court put it in *Illinois v. Gates*, 462 U.S. 213, 240 (1983), "magistrates remain perfectly free to exact such assurances as they deem necessary ... in making probable cause determinations." See also *Franks*, 438 U.S. at 164-65 (1978); Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 NYU L. Rev. 1173, 1188-94 (1987). The government represents that it "is committed to working with the Court" to improve the accuracy of its FISA applications. Wray Declaration at ¶ 20. Separation of powers doctrine does not prevent that vital work from being done.

To be sure, as the FISA Court of Review has recognized, there are limits on this Court's ability to dictate "the internal organization and investigative procedures of the Department of Justice" and the FBI. *In re Sealed Case*, 310 F.3d 717, 731 (FISCR 2002). These limits are important, but they are very likely at or near their lowest ebb when it comes to measures designed to ensure the basic factual accuracy and integrity of FISA applications. Moreover, even if the Court cannot dictate a particular measure directly to the executive branch, it clearly enjoys discretion to reject FISA applications that it reasonably deems to be less than credible, and its assessment of credibility may reasonably be informed by the accuracy measures used (and not used) by the government in preparing the application.

In any event, no specific question of separation of powers is presented here and now. The Court has asked the government why its FISA applications should be trusted, and the government has answered with a proposal to implement various Corrective Actions and other measures over time, and a promise of further updates and continued cooperation. See Wray Declaration ¶¶ 14, 20. Any specific separation of powers issue can be resolved if and when the Court determines that it must require a particular additional measure over the government's objection.

3. The FBI's Proposed Corrective Actions Are Insufficient

To restore this Court's confidence in the accuracy of its FISA pleadings, the FBI has proposed 12 Corrective Actions, as described in the Wray Declaration (¶ 4), the government's January 10 Response, and Director Wray's letter of December 6, 2019 to the Inspector General (Report at 424-434). To assist the Court in assessing these 12 Corrective Actions, they are presented and reviewed below in three functional categories: (a) FISA standards and procedures; (b) training; and (c) audits and reviews. The FBI's proposed Corrective Actions will be helpful to an extent, but they do not go far enough, and accordingly the discussion below proposes several additional corrective actions for the Court's consideration. Thereafter, the brief discusses the importance of cultural reform at the FBI.

a. FISA Standards and Procedures

The FBI reports that it is expanding the information required by the Request Form used by agents to request FISA surveillance, "emphasizing the need to err on the side of disclosure"

when it comes to information "relevant to the consideration of ... probable cause," and including "all information ... bearing on the reliability" of a confidential human source (CHS) for the FISA declaration. Wray Declaration ¶ 4 (Corrective Actions 1-2); see OIG Report at 428-429. Director Wray reports that the Request Form "has been finalized" and will be used beginning February 14, 2020, "following a brief period of training." Wray Declaration ¶ 6. Information about confidential human sources will be captured in a special "CHS Questionnaire," to be used as an addendum to the Request Form, but Director Wray does not know when the questionnaire will be completed or ready for use, and he "proposes to update the Court on the status of the implementation of this Corrective Action by February 28, 2020." *Id.* ¶ 7.

The government's Response (at 11) also explains that it is working on a separate "checklist to be completed by FBI personnel during the drafting process to ensure that all relevant information regarding a source's reliability, including the bias or motivation of the source, as well as the accuracy or basis of a source's reporting, is provided to OI [the Office of Intelligence within the National Security Division (NSD) at DOJ]." The government does not appear to have committed to a timeline for completing this checklist or for reporting on the status of its efforts to the Court. It should be directed to do so. To the extent that it is not already required, this checklist should ensure and document a rigorous inter-agency check for sources that have relationships with other U.S. government agencies.

Director Wray has also required "formalization of the role of FBI attorneys in the legal review process for FISA applications, to include" specification of supervisor roles and "the documentation required for the legal reviewer." Wray Declaration ¶ 10; see *id.* ¶ 4 (Corrective Action 7). This formalized role for FBI attorneys is intended to "encourage [FBI] legal engagement throughout the FISA process, while still ensuring that case agents and field supervisors maintain ownership of their contributions." *Id.* ¶ 10. Implementation of this action will require changes to the FISA Verification Form by February 20; as to other aspects, Director Wray proposes to update the Court by March 27, 2020. *Id.*

In connection with factual verification of FISA applications, as described by Director Wray, the FBI is requiring agents and supervisors to confirm that OI has been advised of "all information that might reasonably call into question the accuracy of the information in the application or otherwise raise doubts about the requested probable cause findings or the theory of the case," and is adding a checklist to aid supervisory review and approval. Wray Declaration ¶ 4 (Corrective Actions 5-6). The Response (at 11) similarly describes the changes to the Request Form (Corrective Action 1) as "designed ... to elicit information that may undermine probable cause." These changes are to be implemented by February 14, 2020. See Wray Declaration ¶¶ 6, 8.[2]

[2] The government also reports that it is revising its prior guidance "that mandated specific practices and documentary requirements to ensure accuracy of facts in FISA applications, certain procedures that should be followed during the drafting of FISA applications to ensure accuracy, and the parameters of subsequent reviews for accuracy by OI personnel." Response at 6. The Response reports that the Court will be advised "when the revised memorandum has been issued." *Id.* at 13.

The FBI is also formalizing the requirements to reverify facts presented in prior FISA applications and make any necessary corrections, and to retain (serialize) forms over time, and is expanding the requirement to document verification of CHS information. Wray Declaration ¶ 4 (Corrective Actions 3-4 & 9); see OIG Report at 428-29. This includes a requirement "to confirm that any changes or clarifying facts, to the extent needed, are in the [next] FISA renewal application," and "[i]mproving the FISA Verification Form by adding a section devoted to" confidential human sources. Wray Declaration ¶ 4 (Corrective Actions 3-4). Director Wray reports that these changes are to be implemented by February 14, 2020. *Id.* at ¶ 8. DOJ also apparently plans to continue the practice under which OI "attorneys are expected to look for errors and omissions in prior submissions to the Court, and, if any are found, to correct the non-material errors or omissions in the subsequent renewal application and to bring any material misstatements and omissions immediately to the attention of the Court." Response at 10. The practice at DOJ is to "err in favor of disclosing information that OI believes the Court would want to know." *Id.* The Court should require the government formally to document and commit to this practice, rather than leaving it as a matter of executive branch discretion.

Finally, the FBI is planning to make certain technological improvements. Wray Declaration ¶ 4 (Corrective Action 11). The government's submissions do not reveal the precise nature of these measures, but they are described generally as both "short- and long-term technological improvements, in partnership with DOJ, that aid in consistency and accountability." Wray Declaration ¶ 12. The one specific example described by Director Wray is that the FBI "is considering the conversion of the revised FISA Request Form into a workflow document that would require completion of every question before it could be sent to OI." *Id.* Director Wray proposes to report to the Court on technological issues by March 27, 2020. *Id.*

Given its failures as documented by the Inspector General, the FBI's focus on improving FISA standards and procedures is understandable. The FISA process is complex, geographically dispersed, high-volume, and often time-sensitive. It requires regular order. As the Inspector General explains in his report, the FBI depends on "adherence to detailed policies, practices, and norms" to do its best work. Report at 410. In general, the various proposed modifications to FISA request forms, checklists, verification forms, CHS questionnaires, supervisor forms, field guidance, and related documents point in the right direction. Given the lessons of the OIG Report, for example, it makes sense to emphasize the "need to err on the side of disclosure," to "elicit information that may undermine probable cause," and to provide "all information ... bearing on the reliability" of a confidential human source. These reforms are not alone sufficient, but reforms of this sort are clearly necessary.

As the new forms and other materials are finalized and implemented, the Court should require the government to demonstrate that they are both well-designed and functioning as designed. Thereafter, the Court should also require the government to review, reassess and report periodically on possible improvements to FISA standards and procedures in light of ongoing experience. Regular and proactive improvement in standards and procedures that averts a crisis is vastly preferable to reactive improvement compelled by a crisis.

Using technology to automate FISA processes has the potential to help significantly. Some years ago, in response to findings by the Inspector General of misuse of National Security Letters, the FBI improved its compliance using similar technological means. See Office of the Inspector General, U.S. Department of Justice, *A Review of the Federal Bureau of Investigation's Use of National Security Letters*, Appendix, FBI Letter to Inspector General at 3-5 (re-released February 2016). The Court should carefully monitor the FBI's progress and require regular updates on technological developments. Technological developments may also be relevant to the use of field agents as FISA declarants, as discussed below.

The focus on specific forms, checklists, and technology, while appropriate, should not be allowed to eclipse the more basic need to improve cooperation between the FBI and DOJ attorneys. Historically, the FBI has not always worked cooperatively with DOJ, especially in foreign intelligence and national security matters (as opposed to ordinary criminal cases). See NSIP § 2:17. As noted above, the Inspector General found significant failures of cooperation and coordination, in which the FBI did not advise DOJ of relevant facts. In evaluating the FBI's Corrective Actions, therefore, the Court should focus on whether and how they further what the government describes as the "iterative process" for preparing FISA applications, in which "attorneys and supervisory attorneys in OI work closely with the case agent or agents ... to elicit, articulate, and provide full factual context." Response at 9. This iterative process is essential to avoiding errors in the first instance, rather than merely detecting them after the fact. It puts primary responsibility on the parties most knowledgeable about the relevant facts and therefore best equipped to prepare a complete and accurate FISA application. For this reason, it is capable of preventing both errors of commission (materially false assertions in an application) and of omission (failing to include material information in an application). As discussed below, the government concedes that errors of omission currently cannot be detected reliably in after-the-fact accuracy reviews conducted by OI. See *id*.

The single most significant process issue that is <u>not</u> addressed in the government's submission concerns the possibility of using field agents, rather than headquarters agents, as declarants in FISA applications. This would represent a major change in practice, with potentially profound consequences, because it would tend to shift responsibility away from FBI Headquarters in particular cases. See NSIP § 6:3. It therefore should not be undertaken lightly.

The FBI's recent failures, however, are egregious enough to warrant serious consideration of significant reform. Using field declarants at least arguably accords with the lessons of experience extending back to the last major crisis in FBI FISA accuracy from the year 2000, need not conflict with the appropriately centralized aspects of the FISA program, and should be newly practicable in light of technological developments in the intervening two decades (possibly including certain of the technological measures involved in Corrective Action 11). See Crossfire Hurricane Essay, *supra*. Of course, even if field agents serve as the FISA declarants, agents at FBI Headquarters would continue to have an important role in coordinating and verifying the accuracy of FISA applications as to matters within their purview.

Even if field agents do not serve as declarants in some or all FISA applications, the Court should require them in appropriate cases to sign or otherwise attest to the Court directly with respect to asserted facts within their purview. On this approach, the headquarters agent would remain the declarant, but the results of the FBI's verification of accuracy by field agents would become visible to the Court and would be made directly to the Court. These attestations of accuracy to the Court could also include more detail, such as statements that the declarants are not aware of any material facts that have been omitted from the application, and other assertions that correspond to the requirements of the updated FISA Request Form (discussed above). This transparency would help reinforce for all of these declarants the importance of scrupulous accuracy and completeness. It would also aid the Court in later holding appropriate parties accountable for any failures. Requiring such verification directly from field agents falls comfortably within the Court's authority to demand appropriate "assurances" of accuracy. *Gates*, 462 U.S. at 241-42. The Court should order the government to address promptly these possibilities concerning the role of field agents in FISA applications and expanded attestations by declarants.

b. Training

Director Wray reports that the FBI is developing two new training modules. The first is a "case study" based on the OIG Report, for training agents on proper FISA procedures "so that mistakes of the past are not repeated." Wray Declaration ¶ 4 (Corrective Action 8). As further described by Director Wray, the case study will be "based on the OIG Report findings, wherein FBI personnel will be instructed on the errors and omissions that were made in the Carter Page FISA applications and associated processes, and taught the updated procedures, policies, and protocols designed to avoid similar mistakes in the future." *Id.* ¶ 11. This case study training, which will include testing to verify student knowledge, is to be completed by April 30 for FBI divisions and by June 30 for all other operational personnel. *Id.*

The second FBI training module, focused on "FISA process," is described as "new training focused on FISA process rigor and the steps FBI personnel must take, at all levels, to make sure that OI and the FISC are apprised of all information in the FBI's holdings at the time of an application that would be relevant to a determination of probable cause." Wray Declaration ¶ 4 (Corrective Action 10). This training is to be completed on the same schedule as the "case study" training – by April 30 and June 30 for FBI divisions and other operational personnel, respectively. Wray Declaration ¶ 11.[3]

At the conceptual level, the two training modules are both sensible. A case study approach should allow agents to experience and learn about accuracy standards in context. This

[3] Director Wray has also required certain "interim training" in the period before the two permanent training modules are used. This interim training will include training on how to use the revised FISA Request Form and checklists as described above, and will also "include an overview of lessons learned from the FISA applications and associated FBI actions examined in the OIG Report, with an emphasis on the critical importance of ensuring accuracy, transparency, and completeness in all FISA applications." Wray Declaration ¶ 9.

may be especially valuable for newer agents who have less experience handling actual matters. It can be easier to describe high standards of accuracy in the abstract than it is to apply them in practice, and a case study helpfully focuses on the latter challenge. It should also serve as an important part of acknowledging past errors and learning from them. Failures often provide better learning opportunities than successes. If and when the Court reviews the case study module, it should do so with these two points in mind (the value of context and of learning from failure). As to the FISA process module, a key element is the requirement to share information with OI, because one of the main failures described in the OIG Report concerned such information-sharing, and because cooperation between FBI and OI is a central element of the important "iterative" FISA process described above. The Court should keep this in mind if and when it reviews the process training module. Moreover, absent a compelling reason, the Court should generally require that OI attorneys participate along with FBI personnel in conducting all FBI training on FISA. This will help ensure a shared understanding of requirements between OI and the FBI.

A separate line of training is conducted by OI attorneys when they visit FBI field offices to conduct accuracy reviews. This training, too, has been updated, and the updated version was apparently first used the day before the government's Response was filed. See Response at 12 & n.10. This training is said to address "the need to bring inconsistent details, the full context of relevant conversations or correspondence, and relevant information from other law enforcement or government agencies to the attention of OI in order to evaluate such information and bring all relevant information to the attention of the Court." *Id.* Training is also planned in January 2020 for "all OI attorneys responsible for preparing FISA applications to be submitted to the Court." *Id.*

Over time, the Court should require the government to report on the training, including participation rates, and the results of testing of student knowledge. It could, for example, require quarterly reporting on these data. Depending on the results of that reporting, the Court can take additional action. The Court should also (absent extraordinary circumstances and a sound explanation) forbid agents who have not successfully completed the training from serving as FISA declarants or factual verifiers.

c. Audits and Reviews

The FBI proposes to "identify and propose audit, review, and compliance mechanisms to ensure the above changes to the FISA process are effective." Wray Declaration ¶ 4 (Corrective Action 12). Additional detail is not provided, and Director Wray proposes to update the Court on this effort by May 22, 2020. *Id.* ¶ 13. It therefore appears that the FBI does not yet have a well-developed plan for enhanced auditing. The Court should inquire skeptically as to why this is the case, and take appropriate action based on what it learns.

At present, OI "conducts oversight reviews," which are after-the-fact reviews, "at approximately 25-30 FBI field offices annually." Response at 7. Some of these oversight reviews

also include "accuracy reviews ... to ensure compliance" with the FBI's verification of accuracy procedures. *Id.* In particular, under current standards, accuracy reviews cover four areas:

> (1) facts establishing probable cause to believe that the target is a foreign power or an agent of a foreign power; (2) the fact and manner of FBI's verification that the target uses or is about to use each targeted facility and that property subject to search is or is about to be owned, used, possessed by, or in transit to or from the target; (3) the basis for the asserted U.S. person status of the target(s) and the means of verification; and (4) the factual accuracy of the related criminal matters section, such as types of criminal investigative techniques used (e.g., subpoenas) and dates of pertinent actions in the criminal case.

Id. at 7 n.5. "During these reviews," the Response explains, "OI attorneys verify that every factual statement in [these four] categories of review ... is supported by a copy of the most authoritative document that exists or, in enumerated exceptions, by an appropriate alternate document." *Id.* at 8. Access to the identity of confidential human sources may be limited, either by redaction of identifying information from the relevant sub-file or (if necessary) by using an FBI intermediary to confirm the accuracy of source-related assertions. *Id.* at 8 & n.6. (If not already required, these FBI intermediaries should document and attest to the accuracy and completeness of their reporting to the OI attorneys.) Accuracy reviews are also conducted as a matter of practice in cases where information obtained or derived from FISA is to be used in a proceeding against an aggrieved party. *Id.* at 7.

DOJ is "considering whether to supplement its existing accuracy reviews with additional oversight measures designed to determine the completeness of applications subject to review." Response at 13. It promises to "provide a further update to the Court if such measures are implemented." *Id.* The Court should require an update whether or not such measures are implemented, including an explanation for any decisions made.

One of the most challenging aspects of the current accuracy reviews concerns their ability to detect errors of omission rather than commission in a FISA application (as discussed briefly above in connection with the "iterative" process for preparing FISA applications). The government's Response (at 9) describes this challenge as informed by the problems found in the OIG Report:

> Admittedly, these accuracy reviews do not check for the completeness of the facts included in the application. That is, if additional, relevant information is not contained in the accuracy sub-file and has not been conveyed to the OI attorney, these accuracy reviews would not uncover the problem. Many of the most serious issues identified by the OIG Report were of this nature. Accordingly, OI is considering how to expand at least a subset of its existing accuracy reviews at FBI field offices to check for the completeness of the factual information contained in the application being reviewed. NSD will provide a further update to the Court on any such expansion of the existing accuracy reviews.

It is notable, and troubling in light of the Inspector General's report, that "accuracy reviews do not check for the completeness of facts included in the application." The difficulty appears to be that searching for errors of omission, in which the material facts were known but not documented in the FISA application or internal accuracy files, is extremely resource-intensive, particularly for reviewers who did not themselves participate in the underlying investigation. It may, for example, require interviewing FBI witnesses, some of whom may be geographically dispersed by the time of the review. But as the government concedes, and the Inspector General's report shows, this kind of in-depth review also detects errors that might otherwise go unnoticed. They are therefore extremely valuable. Even if in-depth reviews cannot be conducted in every case, the possibility that they may be conducted in any given case (unpredictably selected) should help concentrate the minds of FBI personnel in all cases. This is a necessary and desirable outcome in light of the failures documented in the OIG Report.

The Court should require the government to conduct more accuracy reviews, to expand those reviews, and to conduct a reasonable number of in-depth reviews on a periodic basis. The FBI and DOJ have vast resources, and they should dedicate significantly more of those resources to auditing, sufficient to ensure coverage in a reasonable percentage of cases, and perhaps a higher percentage of certain types of cases (e.g., those involving U.S. persons, certain definitions of "agent of a foreign power," and/or SIMs). The best approach to quantifying this effort will likely involve statistical analysis – e.g., conducting accuracy reviews as needed to ensure visits to field offices that together account for more than 80% or 90% of FISA applications. Notwithstanding the government's proposal to report in late May, the government should be directed promptly to submit a proposal for conducting additional in-depth and other accuracy reviews, with supporting analysis. The results of those reviews over time, and of the Inspector General's ongoing FISA audit (Report at xiv, 380), may inform appropriate future actions in this area.

4. Cultural Reform

The Court's close review of the FBI's 12 proposed Corrective Actions should not obscure the larger issues presented. Standards and procedures, checklists and questionnaires, automated workflows, training modules, and after-the fact audits are all important. But they cannot be allowed to substitute for a strong FBI culture of individual ownership and responsibility for the accuracy and completeness of FISA applications. Without that, even the best procedures will not suffice; indeed, expanded procedures dictating multiple layers of review and approval could backfire, creating a kind of moral hazard, in which each layer believes, or assumes, that errors have or will be caught by the others. Organizational culture is paramount to real reform, and the Inspector General's report suggests that the FBI's culture of accuracy has suffered. The Court should keep organizational culture in focus through all aspects of its work with the government. A culture of operational personnel who feel checked and second-guessed by distant compliance officers is far less effective than a culture in which operators themselves are made to feel like compliance officers, with direct responsibility and accountability for following the rules.

A key method of improving organizational culture is through improved tone at the top, particularly in a hierarchical organization such as the FBI. Director Wray's statements recognize the very serious nature of the problems identified by the OIG Report. His letter to the Inspector General, included as Appendix 2 in the Report, acknowledges that FBI personnel

> did not comply with existing policies, neglected to exercise appropriate diligence, or otherwise failed to meet the standard of conduct that the FBI expects of its employees – and that our country expects of the FBI. We are vested with significant authorities, and it is our obligation as public servants to ensure that these authorities are exercised with objectivity and integrity. Anything less falls short of the FBI's duty to the American people.

Report at 424-25 (emphasis added). Wray goes on to say that "the FBI accepts the Report's findings and embraces the need for thoughtful, meaningful remedial action." *Id.* at 425. In the government's January 10 Response, his declaration explains that the FBI "deeply regrets the errors and omissions identified by the OIG," and acknowledges that the Report and related materials "describe conduct that is unacceptable." Wray Declaration ¶ 20. Director Wray's statements compare relatively favorably, in their level of candor and acceptance of responsibility, to analogous statements made in response to prior reports by Inspectors General documenting significant failures by the FBI. See, e.g., U.S. Department of Justice, Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* at A-5 to A-12 (Mach 2008) (OIG NSL 2006 Report).

Director Wray has also taken some steps to communicate his views directly to the workforce. On December 9, 2019, the day the OIG Report was released, he distributed a video message to "all FBI personnel" on "the absolute need for accuracy and completeness in all FISA applications." Wray Declaration ¶ 18. The government's Response, filed on January 10, pledges in addition that the "FBI will communicate directly to the entire FBI workforce through a message from the FBI Director on January 13, 2020, describing [the corrective] actions [being undertaken in response to the OIG Report] and emphasizing both the importance of adhering to the accuracy procedures and the commitment of the FBI to ensure factual accuracy and completeness in all submissions to the Court." Response at 10. Wray also says that he expects these messages to be conveyed by others through "the [interim] training on new forms that will be provided virtually and at field offices" in January and February. Wray Declaration at ¶ 18. The two new permanent training modules will also address them.

These efforts are a reasonable beginning, but they are not sufficient and should be expanded and supplemented. Director Wray and other FBI leaders, as well as relevant leaders at the Department of Justice, should include discussions of compliance not only in one or two messages, but in virtually every significant communication with the workforce for the foreseeable future. Every time (or almost every time) Director Wray visits a field office in 2020, for example, his remarks should include appropriate references to the paramount and urgent

need for accuracy and rigor in FISA applications. He should also require his subordinates to deliver similar remarks through their own formal and informal interactions with FBI employees, whether in regular staff meetings or otherwise. The message, and seriousness of purpose, should cascade through the FBI Deputy Director, Associate Deputy Director, Executive Assistant Directors, Assistant Directors, Deputy Assistant Directors, Special Agents in Charge, Assistant Special Agents in Charge, Section Chiefs, Unit Chiefs, and squad supervisors. Repeated and relentless communication is often required to convey a corrective message to an organization as large, dispersed, complex, and proud as the FBI. The Court should require the FBI and DOJ to document and report on the nature and extent of this communication; such a requirement to document and report communication may encourage the FBI and DOJ to conduct more of it.

Individual accountability and discipline are also critical to organizational culture. In 2000, in the face of significant accuracy failures, this Court publicly announced that it had barred an agent (whose name was not revealed) from appearing before the Court. See Crossfire Hurricane Essay, *supra*. This action by the Court contributed significantly to agents focusing intensely on accuracy immediately thereafter. Director Wray has pledged that "where certain individuals have been referred by the OIG for review of their conduct, the FBI will not hesitate to take appropriate disciplinary action if warranted at the completion of the required procedures for disciplinary review." OIG Report at 425. The Court should require the government to provide an appropriate briefing on these disciplinary reviews and results to ensure that Wray's pledge is carried out. This is essential in an effort to create compelling incentives for agents and other personnel to adhere to requirements (without unfair scapegoating). The Court also should not hesitate to take whatever additional action is appropriate under the circumstances, including once again barring agents from appearing in the Court. See also Response at 2 n.1.

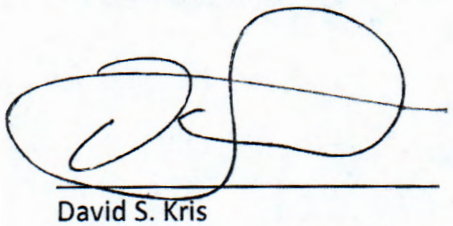
In the meantime, and during the interim period in which many of the Corrective Actions are still being developed and implemented, the Court should, to the extent that it deems appropriate, consider holding hearings in a larger number of cases than usual. It should also consider involving field personnel in those hearings where feasible, either in person or using technology. This will be resource-intensive, but it offers an opportunity for the Court to interact with FBI and other personnel in small groups, to convey its concerns and expectations to those personnel, and to question and press them on their commitment to accuracy and their rigor in following procedures. This is one way that the Court can both assess and favorably influence the FBI's culture.

The government's efforts to reform, and the Court's insistence on scrupulous accuracy, must be ongoing. Culture is not a permanent fixture. It must be continually reinforced and modified to remain effective, especially in changing conditions. Apart from the timetable proposed by the government, the Court should be sure to revisit the question of accuracy on a regular basis and at appropriate milestones. Whether or not they recognize it, organizations like the FBI are constantly involved a kind of cultural anamnesis, simultaneously forgetting and recalling their past. It has been a nearly a full generation since the last major FBI FISA accuracy problem in 2000, and the present moment demands a renewed and ongoing commitment to accuracy, and more generally to the rule of law.

Conclusion

The Inspector General has described in a detailed and compelling manner the "FBI's failure to adhere to its own standards of accuracy and completeness when filing [FISA] applications." Report at 410. In response, this Court has rightly questioned whether it can continue to trust FBI affidavits, and demanded assurances of accuracy and completeness. The government has proposed 12 Corrective Actions which point in the right direction but do not go far enough. The many additional measures described above should also be considered and undertaken where deemed appropriate by the Court. Above all, however, the FBI must restore – and the Court should insist that it restore – a strong organizational culture of accuracy and completeness.

Respectfully Submitted,



David S. Kris
Court-Appointed *Amicus Curiae*

Dated: January 15, 2020

cc: Gabriel Sanz-Rexach
Acting Deputy Assistant Attorney General
National Security Division
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